87-197

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL AMERICAN COMMUNICATIONS CORP., et al.,

Petitioners,

— VS. —

JACK NOTTINGHAM, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STUART A. JACKSON, ESQ.
Attorney for Petitioners
Office & P.O. Address
250 West 57th Street, Suite 726
New York, New York 10019
(212) 685-7789

Of Counsel:
MARTIN OZER, ESQ.

July 31, 1987

QUESTIONS PRESENTED FOR REVIEW

1. Was the granting of a new trial mandatory when Petitioner's rights to a fair trial were violated by counsel's closing arguments appeal to regional prejudice?

2. Was a new trial for Petitioners mandatory when the verdict by the jury was inconsistent, incomprehensible and resulted from an improper charge by the trial court?

3. Were the rights of Petitioners violated when the complaint was not dismissed under Rule 19(b) of the Federal Rules of Civic Procedure for failure to join James A. Rumpf as an indispensible party?

LIST OF PARTIES

The parties to the instant proceeding are General American Communications Corp. and Stuart R. Ross, Petitioners and Dianne Fletcher, James M. Purdy, Howard Reser, John W. Sammons III, Eric M. Hohn, H.H. Sheperd and Billy Jean Hooks, as Respondents. Jack Nottingham, Sigmund T. Weiner, David E. Conner were dismissed from the case.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdictional Grounds	3
Statutes Relating to Case	3
Statement of the Case	4
Argument	7
Conclusion	16

APPENDIX A - Decision of the Court of Appeals of the Fifth Circuit, March 6, 1987.

APPENDIX B - Order of the Court of Appeals of the Fifth Circuit denying petition for a rehearing, dated April 3, 1987.

APPENDIX C - Order of the District Court, Honorable Barefoot Sanders, October 9, 1986.

TABLE OF AUTHORITITES

CASES CITED

	Page
Carner v. Quality Control, 696 S.W. 2d 549 (Tex. 1985)	9
Diamond Shamrock Corp., v. Zinke & Trumbo. Ltd. 791 F.2d 1416 (1st Cir. 1986)	11
Fredonia Broadcasting Corp. v. RCA 481 F.2d 781 (5th Cir. 1979)	11
Freeman v. Northwest Acceptance Corp. 754 F.2d 553 (5th Cir. 1985)	14
Hilton v. Atlantic Refining Co., 327 F.2d 217 (5th Cir. 1964)	13
Keegan v. Humble Oil & Refining Co., 155 F.2d 971 (5th Cir. 1946)	15
McCowen v. Jamieson 724 F.2d 1421 (9th Cir. 1984)	15
Takeda v. Northwestern National Life Insurance 765 F.2d 815 (9th Cir. 1985)	14
Federal Rules of Evidence Rule 403	10
Federal Rules of Civil Procedure Rule 19(b)	11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO.

JACK NOTTINGHAM, et. al.,

Plaintiffs- Appelles,

-versus-

GENERAL AMERICAN COMMUNICATIONS CORP., et. al.,

Defendants - Apellants

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the Trial Court has been officially reported as 811 F.2d 873 (5th Cir.) and is reproduced Appendix A.

The Order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing has not been officially reported, and is reproduced in Appendix B.

The order of the District Court has not been officially reported but is reproduced herein in Appendix C.

JURISDICTIONAL GROUNDS

The Order of the Court of Appeals for the Fifth Circuit denying the petition for a rehearing was entered on April 3, 1987. An Order by Honorable Bryon R. White, Associate Justice of the United States Supreme Court extending the time for the filing of the Writ of Certiorari to and including August 3, 1987 was entered on July 2, 1987. The Petitioner is therefore timely filing this application for a writ of Certiorari persuant to Rule 20 of the United States Supreme Court Rules and the jurisdiction of this Court is involved pursuant to Title 28 U.S.C. 1254 (1).

STATUS RELATING TO CASE

Statute involved is Federal Rules of Civil Procedure Rule 19 (b).

STATEMENT OF THE CASE

Petitioners appeal from a judgment entered in the District Court for the Northern District of Texas, Dallas Division entered against them in the sum of $944,128.70 and which was affirmed by the United States Court of Appeals for the Fifth Circuit.

The case arose out of the purchase by the Respondents from the Petitioners of a series of children's video programs based upon "Felix the Cat" as part of an investment and tax shelter program. The Petitioners were New York based and the investments were sold to the Texas Respondents by an independent tax shelter broker, James A. Rumpf. Then the independent broker, James A. Rumpf induced the Respondents not to pay the notes due under the investment program and not go forth with the distribution of the video programs.

Petitioners then commenced an action against the Respondents on the notes. Respondents then commenced an action against Petitioners alleging that the Petitioners on their agents made false representations regarding these investments, which action was consolidated with the action by the Petitioners. James A. Rumpf, the broker, was not sued and not made a party by the Respondents.

At the trial, the attorney for Respondents, during summation referred to Petitioners in a manner calculated to invoke a "carpetbagger" spectre over the trial. There were several references to the fact that the Petitioners were from New York and the Respondents from Texas in order to invoke regional prejudices.

The jury verdict totaling

$944,128.70 was excessive, confused and inconsistent and said verdict included damages, pre-judgment interest, attorney's fees and recission of the notes sued upon.

The issues of the inconsistent and excessive verdict, the summation as an appeal to the prejudices of the jury and the failure to dismiss the complaint of the Respondents under Rule 19 (b) of the Federal Rules of Civil Procedure for failure to join James A. Rumpf as an indispensible party were all rejected by the United States Court of Appeals for the Fifth Circuit which issued a written decision (see Appendix A).

ARGUMENT

The Petition for a Writ of Certiorari should be granted for the following three reasons:

a) The jury verdict was a result of counsel's summation which was a calculated and sucessful appeal to the prejudice of the jury.

This case involved the sale of the tax sheltered investments involving production and distribution of video programs based on "Felix the Cat" a known and recognized child's cartoon character. The Petitioners and their attorney were New York based and this case was tried in Dallas, Texas. The danger of regional prejudice may always be potentially existent and the Court has the obligation to protect the parties from actions and argument that seek to invoke latent hostility as a substitute for reason and cool

determination of the facts. Instead a blatant attempt was made to influence the jury and inflame regional prejudices. During the trial the "carpetbagger" motif was used continuooously. The Respondents attorney, on direct examination, inquired how long each Respondent lived in Dallas and on summation used language blatantly referring to the Petitioners "coming down here," "people like this" and "we have had enough of them in Dallas." The excessive and inconsistent sums awarded by the jury, coupled with the outlandish awards of costs and fees, were clearly the result of jury passion and prejudice. This appeal to prejudice taints the verdict itself and calls to question the very independence of the finding of liability. Clearly, justice and

fairness require a new trial.

b) The jury verdict was inconsistent, incomprehensible, confused and resulted from an improper charge to the jury.

The Court permitted the jury to award prejudgment interest on sums other than out of pocket expenses. By doing this pre-judgment interest was awarded on future damages which is clearly erroneous. Carner v. Quality Control Parking Inc. 679 S.W. 2d 549, 552 (Tex. 1985). Futhermore, the award itself of damages of $65,000 per investor was not based on any testimony or evidence but was merely a surmise by the jury. The jury was even allowed to consider testimony about the Internal Revenue Service valuation of the investment by the Respondents themselves without any other offer of

the evidence by the Respondents as to the value of the investment.

Assuming arguendo, that the above testimony could be deemed admissible, it cannot be questioned that since this testimony represented the only statement submitted by the respondents regarding the value of the program was inherently unreliable as to the issue of value, its prejudicial effect far outweighed its probative value. Fed. R. Evid. 403. The probative value of the evidence must be balance against its prejudical effect. "Unfair prejudices" means evidence which has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" 10 Moore's Federal Practice Section 403.10 (2ed. 1985)

The stage was now set for a runaway

jury to award damages without any basis, impermissible pre-judgment interest and excessive counsel fees. As a last step, the trial court also gave the Respondent's recission of the notes in addition to the damages. The law is well settled that a party cannot seek both to have a contract rescinded and at the same time sue on the contract for damages resulting from the fraudalent transaction. Fredonia Broadcasting Corp. RCA, 481 F.2d781 (5th Cir. 1973). The determination by the jury, coupled with the rank call to regional prejudice can only be remedied by a new trial. Diamond Shamrock Corp. v. Zinke & Trambo Ltd. 791 F.2d 1416 (10th Cir. 1986).

c) The complaint should have been dismissed under Rule 19 (b) of the Federal Rules of Civil Procedure.

James A. Rumpf, who was the independent sales promoter in Texas and upon whom the Respondents relied in purchasing the investments from the Petitioner was not named by Respondents as a party defendant. He was a major part of the case. It was he who sold the investment program to the Respondent and it was he whose statements were made as the basis for finding liability against the Petitioner. The Petitioners point of contact in Texas was by and through James A. Rumpf. Futhermore, it was he who counseled and importuned the Respondents not to pay the notes and not to go through with the distribution of the video programs. This failure to join him as a party was not inadvertent but was designed.

Respondents, in a transparent

effort to maintain federal jurisdiction, failed and refused to name Texas citizen James Rumpf as a defendent and sued only the New York Defendents, in total disregard of the Petitioner's (i) clear cause of action over against Rumpf for contribution and/or indemnification for any judgment against them in favor of Plaintiffs, and (11) right to reimbursement for sums paid Rumpf as commissions on sales to Plaintiffs.

> An indispensible party is one whose relationship to the matter in controversy is such that no effective decree can be entered without affecting his rights. Hilton v. Atlantic Refining Co., 327 F2d 217, 218 (5th Cir. 1964). [judgment reversed and remanded to state court]

The value of Petitioner's claims against Rumpf is undoubtedly established by the judgment in this action. Moreover, in the lawsuit

between Petitioners and Rumpf, Rumpf will be collaterally estopped from relitigating significant findings inter alia that none of the Defendants committed any act of willful or intentional fraud against the Plaintiffs.

Where a party could be collaterally estopped from relitigating issues to be decided, the party is a necessary party. Takeda v. Northwestern National Life Insurance Co., 765 F.2d 815, 821 (9th Cir. 1985); Freeman v. Northwest Acceptance Corp., 754 F.2d 553 (5th Cir. 1985) [corporation held indispensible party because its presence was critical to the disposition of the important issues in the litigation. As a primary participant in the transaction, its evidence would either support the

complaint or bolster the defense. Freeman v. Northwest Acceptance Corp., at 559

Moreover, "[t]he fact that a joinder of the absent parties might deprive the court of jurisdiction does not make them any less indispensible." Keegan v. Humble Oil & Refining Co., 155 F.2d 971, 973 (5th Cir. 1946)
The issue of indispensibility is so important that the Court also has the power, sua sponte, to dismiss the complaint. McCowen v. Jamieson 724 F.2d 1421 (9th Cir. 1984)

That as outlined above the interests of justice require this Court to grant the instant petition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

STUART A. JACKSON
Attorney for Petitioner
Office and P.O. Address
Suite 726
250 West 57th Street
New York, New York 10019
(212) 685-7789

APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ISSUED ON MARCH 6, 1987

No.85-1732

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JACK NOTTINGHAM, et al.,

Plaintiff-Appellees,

- against -

GENERAL AMERICAN COMMUNICATIONS CORP.,et al..

Defendants-Appellants

PER CURIAM:

The district court awarded disgruntled investors damages and partial rescission of agreements and promissory notes related to the rights to produce and exploit children's educational video programs featuring

BEST AVAILABLE COPY

Felix the Cat. We affirm.

1

A

Stuart R. Ross conceived of and marketed the "1981 GAC Video Production Program," a tax shelter and investment program that included the rights to produce and exploit children's educational video programs. Investors were to receive substantial revenues from the distribution of the video programs, as well as substantial tax deductions and credits available to them as "producers" of the shows under 26 U.S.C. Section 48(k). Ross marketed and managed the investment program through General American Communications Corporation, of which he was the president and controlling shareholder. Viewtek Corp., another company Ross controlled, was to make the programs for the investors.

Telefeatures, Inc., which Ross formed with Gustaye Nathan in late 1981 or early 1982, was expected to distribute the videos on commission to retail stores, television stations, and cable systems throughout the world.

The 1981 GAC Video Production Program cost $226,000 per show: $176,000 for the "Rights Acquisition Agreement" and $50,000 for the "Production Facilities Agreement." At closing, each investor was to pay $20,000 to GAC, which included a $2,000 commission, and to execute a "Production Note" for $208,000 payable Febuary 1, 1999. To secure payment of the Production Note, each investor also was to execute two short-term notes, the first for $15,000 payable on April 1, 1982, and the second for $10,000 payable on April 1, 1983.

The program called for GAC to deposit the funds used to satisfy the short-term or "Security" notes in an interest-bearing account that would be used to retire the Production Note at maturity. GAC was also to deliver to each investor by December 30, 1981, "two (2) high band color master tapes, two (2) color protection tapes, and music cue sheets, all of which shall comply with technical standards accepted in the television industry." Under the tax code, if the video programs were not in service by December 30, 1981, the investors could not claim tax credits in 1981.

James A. Rumpf, an investment broker in Dallas, Texas, heard of the 1981 GAC Video Production Program and invited Ross to make a sales presentation in Dallas. At the

presentation in November 1981, Rumpf stated "that GAC has chosen our firm to market their firm in Texas and Oklahoma." Rumpf, Ross, and the national director of sales for GAC, Dick Skyra, all promoted the Program enthusiastically, representing that a "conservative," "realistic projection" of the revenues from sales to cable companies alone over five years "would be a hundred thousand dollars" for each half-hour program. They also represented that income would continue during the lifetimes of the investors and their children; that GAC would provide legal counsel to the investors should the IRS challenge the Program's value and the investors' credits and deductions: and that the video programs would be in service by December 30, 1981, because GAC could produce the

video programs in seven to fifteen days. Rumpf and his associate, Russ Chaission, made similar representations in later sales presentations to investors who did not attend the meeting with Ross.

In 1981, Dianne Fletcher, James Purdy, John Sammons III, Eric Hohn, H.H, Shepherd, and Billy Jean Hooks, all residents of Dallas, bought one Program each, and Howard Reser, also a Dallas resident, bought two Programs. By December 30, 1981, none of the investors had received the video programs, although GAC claimed the programs were aired at its expense over a Long Island cable system. On January 29, 1982, GAC sent the investors a letter saying that they would soon view Felix the Cat on a completed video cassette that would be delivered during

completed videos, but instead on March 10, 1982, sent another letter saying that the investors would receive "an off-line edited version of Felix programs" in the next several days.

In late March 1982, the investors received a video cassette tape that GAC described as a "rough working cut." The investors were disappointed because the videos contained almost no animation, took place almost entirely inside Felix's "clubhouse," and contained little or none of the material they expected from the program descriptions in GAC's catalog. The investors nevertheless paid the 1982 Security Note due April 1. GAC and Telefeatures continued to assure the investors that the video programs were progressing and being well-received in the marketplace. Nonetheless, GAC

never delivered final masters of the quality television required, nor did it remit to the investors revenues from the distribution of the video programs.[1]

In 1983, the investors paid GAC for the 1983 Security Notes under restrictive endorsements allowing GAC to cash the checks only if GAC delivered to the investors the final, edited master tapes of the video programs. GAC returned the checks and accelerated the Production Notes.

B

Ross and GAC filed suit in the Southern District of New York on May 5, 1983, seeking to collect on the accelerated Production Notes. The investors filed suit in the Northern District of Texas on May 5, 1983, against Ross, GAC, Telefeatures, and others [2] alleging securities fraud,

breach of contract, common-law fraud, and violations of the Texas Deceptive Trade Practices Act. The investors raised the same claims in defense to the action in New York.

On June 13, 1984, the New York suits and the Texas suits were consolidated in the Northern District of Texas, with the investors designated as the plaintiffs and Ross, GAC, and Telefeatures as the defendants. The judge submitted all claims to the jury, instructing it not to worry about double recovery if it found liability under more than one theory, for "it would be the Court's job to take your answers and ensure that pliantiffs receive only one recovery of actual damages."

The jury found that GAC and Ross had violated Rule 10b-5 and awarded

damages of $35,236.08 per Program; that GAC breached its contract to provide legal services and to account for the security account, but that Telefeatures did not breach the Distribution Agreement, and awarded damages of $15,000 per Program;[3] that Ross and GAC did not commit common-law fraud; that GAC and Ross violated the DTPA, and awarded the investors damages of $65,000 per Program and $35,000 per investor for mental anquish; that GAC and Telefeatures were Ross's alter egos: and that ther was a failure of consideration for the investors' promissory notes.

The district court entered judgement awarding damages of $65,000 per Program under the DTPA and of $2,000 per plaintiff under the DPTA doubling statute, Tex.Bus. & Comm.

Code Section 17.50 (b) (1), awarding prejudgement interest and attorneys' fees, and rescinding the 1983 Security Notes and the Production Notes. Ross and GAC appeal.

II

GAC argues that the verdict resulted from the improper admission of hearsay evidence about the value of the Program and from the local prejudice that plaintiffs' counsel aroused.

A

[1] The district court permitted two plaintiffs to testify that IRS had valued their Programs at zero and therefore had denied their deductions and credits. The district court relied on Fed.R.Evid. 803(24), which provides an exception to the hearsay rule and is based on a balancing of need and

trustworthiness. See Herdman v. Smith, 707 F.2d 839, 842 (5th Cir.1983). The court apparently believed the testimony was necessary because it was material to the falsity of GAC's representations about the Program's tax benefits and because it was less distracting or prejudicial than testimony of an IRS evaluator, whom the court did not permit to testify. The court also viewed the evidence as trustworthy, for GAC was able to cross-examine the witness, Fletcher, to attempt to show that the valuation was based on her failure to follow the recommended accounting treatment in the Program and not based on the lack ofvalue of the Program itself. Whatever the merits of the district court's analysis of Fed.R.Evid. 803(24), the admission of the testimony was harmless because GAC itself elicited testimony from

David Conner, an investor not party to the suit, that the IRS had not allowed his deductions and had called the program a "sham." In addition, the jury heard and viewed much other evidence, including proof of GAC's failure to complete the tapes or distribute revenues, that established a low value for the Program.

B

[2] GAC also argues that plaintiff's counsel inflamed local prejudice. Once in over forty-eight minutes of closing argument, plaintiff's counsel stated that punitive damages should be awarded "to deter GAC and Stuart Ross from coming down here and making these kinds of representations and misleading investors ever again." In eleven

minutes of summation, plaintiffs' counsel stated once that "Mr. Ross came down here," stated once that "Mr. Keiter goes up in November," and asked for punitive damages "to send a message to Mr. Ross, to people like him,... to keep them from coming down here and preying upon people like this... I want you to say something to people like this: Stop these fraudulent activies, we have had enough of them ... in Dallas or anywhere else." Contrary to GAC's assertion, these scattered remarks did not appeal to local prejudice against New Yorkers nor sway the jury, as is shown by the jury's decision not to award punitive damages.

III

GAC argues that the district court erred in denying GAC's motion for judgement n.o.v. or for a new trial.

A

[3] A party may move for judgement n.o.v. only on grounds previously asserted in a motion for directed verdict, for the motion for judgement n.o.v. is merely the renewal of the motion for directed verdict. Jones v. Benefit Trust Life Insurance Co., 800 F.2d 1397, 1401 (5th Cir.1986); Fed.R.Civ.P. 50(b). GAC moved for directed verdict on two grounds: (1) the Program was not a security, and (2) plaintiffs had not established claims against Telefeatures and Nathan. Nathan was voluntarily dismissed from the suit, and the jury did not find liability against Telefeatures; thus, the second ground is no longer relevant to the case. The judge submitted the securities claims to the jury, and the jury awarded damages under those

claims. Nevertheless, the district court did not enter judgement on the securities claims; thus, the first groun is no longer relevant to this case. [4]

B

[4] GAC argues that the district court confused the jury by submitting to it inconsistent theories of relief under the securities claims and the DPTA claims. GAC correctly points out that a security is neither a good nor a service under the DPTA. Tex.Bus. & Comm.Code Ann Section 17.45. See Portland Savings and Loan Association v. Bevill, Bresler & Schulman Government Securities, Inc., 619 S.W.2d 241, 245 (Tex.Civ.App.-Corpus Christi 1981, no writ). GAC incorrectly argues, however, that the characterization of the Program as a

security prevents recovery under the DPTA. As we recntly explained in Federal Deposit Insurance Corporation v. Munn, 804 F.2d 860,865 (5th Cir.1986), services related to the sale of a security may be services covered by the DPTA when they also are objectives of the transaction. The contract for legal services, the Production Facilities Agreement, and the Distribution Agreement, amoung others, were plainly for services that were objectives of the transaction in this case. It was not error to submit both claims to the jury.

C

[5,6] GAC argues that the district court confused the jury by providing contradictory definitions of "actual damages" to the jury. GAC may not raise this issue on appeal because it

failed to object to the instructions before the jury retired to consider its verdict. Fed.R.Civ.P.51. Limited review is available, however, to ensure that the instructions did not lead to an incorrect verdict that is manifestly unjust. See Brooks v. Great Lakes Dredge-Dock Co.,754 F.2d 536, 538(5th Cir.1984), modified, 754 F.2d 539 (5th Cir.1985). Here no such injustice occured. Although the phrase "actual damages" was given varying definitions, each applied to a seperate claim and each was a proper instruction on damages recoverable under that claim. Although different amounts of damages were awarded for each claim, the differences were not the conscientious obedience to the court's proper instructions.

D

[7] GAC argues that retrial should be granted because the plaintiffs' damages were unliquidated: the ulitimate deductions the IRS will allow is unknown. In Randall v. Loftsgarden, -- U.S. --, 106 S.Ct. 3143, 3155, 92 L.Ed.2d 535 (1986), the Supreme Court held that recovery a defrauded tax shelter investor receives under Section 12(2) of the Securities Act of 1933 or Section 10(b) of the Securities Exchange Act of 1934 may not be reduced by any tax benefits the investor received from the investment. If tax benefits cannot reduce the damages under the strict "out-of-pocket" measure applied in the securities laws, Randall, 106 S.Ct. at 3153, we are persuaded that Texas courts would not use tax benefits to

reduce recovery under the Texas DTPA, which permits plaintiffs to recover the "greatest amount" of actual damages, Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex.Civ.App.-Waco 1978, writ ref'd n.r.e.). The relevant damages were not unliquidated in this case.

IV

GAC argues that the jury verdict is "fatally flawed" because the jury's calculations of damage are contradictory and not supported by the evidence. The jury's damage calculations are not contradictory. As we have already noted, the different awards for each claim reflect different measures of damages and different causes of injury.

[8] The awards are also supported

by the evidence. The jury awarded $35,236.08 per Program for violations of Rule 10b-5. The award was based on the evidence of the $20,000 down payment, the $15,000 1982 Security Note that was paid, and interest paid on the note, less whatever revenues the investors received from the Program. We find no error in this determination of "out-of-pocket" damages.

[9,10] The jury awarded $15,000 to each investor for breach of contract, except for Reser, to whom the jury awarded $20,000. The breach of contract claim treated only the failure to provide legal services for tax challenges and accounting services for the security account; therefore the award need not agree with either the securities or DPTA awards, which dealt with damages from other problems with

the Program. Nor need Reser's recovery be exactly double that of the others to be consistent: his legal costs in defending two Programs before the IRS are not necessarily twice the costs of defending one alone. [5]

[11] Finally, the jury awarded damages of $65,000 per Program for the DPTA violations. According to the instructions, the amount was expectation damages: the difference between the value of the Program as delivered and as promised. The evidence allowed the jury to determine that the value of the Program as delivered was zero: Fletcher, Hohn and Conner testified the IRS valued the Program at zero: various witnesses testified that they never received the tapes they were promised; and witnesses and the unfinished tapes shown to the

jury indicated that the tapes were not marketable as the contract provided. The evidence also allowed the jury to determine that the value of the program as promised was over $65,000: Ross stated that a conservative projection of revenues from the video tapes over five years was $100,000; several plaintiffs testified that the defendants told them that in the "worst case" the Programs would be valued at $100,000; and Sammons tesified that he was told the Programs would generate up to $371,700 in income over seven years time. The award of $65,000 per Program is therefore well within the range of awards supported by the evidence.[6]

V

[12] GAC argues that the award of damages in addition to rescission of the 1983 Security Note and the

Production Note was improper. However, Texas courts permit DPTA plaintiffs to recover both damages and rescission of future obligations in order to compensate plaintiffs for the full damages caused by deceptive trade practices. See Whirlpool Corp. v. Texical, Inc., 649 S.W. 2d 55, 57 (Tex.App.-Corpus Christi 1982, no writ). By the terms of the DPTA itself, the award of damages under DPTA is "not exclusive" of, but "in addition to," any other remedies provided by law. Tex.Bus & Comm.Code Ann Section 17.43.

In this case, GAC sued on the Production Note, and the investors raised failure of consideration as their affirmative defense. The investors also sued GAC alleging DPTA violations. As in Whirlpool, the jury

found for the investors on both claims and the judge properly entered judgement awarding damages and rescinding the notes. Implicit in the district court's ruling is that the Rights Aquisition Agreement was rescinded also. [7] Thus, GAC retains the rights to the master tapes-if any exist-and the investors' recovery is not excessive. See Whilpool, 649 S.W.2d at 57.

VI

[13] GAC argues that attorneys' fees were not authorized or should not be awarded because the investors failed to allocate the fees among the claims. The DTPA Section 17.50(d) requires prevailing DPTA consumers to be awarded court costs and reasonable fees. Texas law also allows recovery of attorneys'

fees for claims for "an oral or written contract." Tex.Rev.Civ.Stat.Ann. art. 2226 (current version at Tex.Civ.Prac. & Rem.Code Section 38.001(8)). Both provisions allow recovery of attorneys' fees in this case, for investors are prevailing DTPA consumers who sued on a written contract.

[14] Nor should the district court have allocated fees among the claims in this case. Fees need not be allocated when the matters entailed in the claims and counterclaims are intertwined, arise from the same transaction, and require essentially the same facts to prosecute the claims and defend the counterclaims. See Veale v. Rose, 657 S.W.2d 834, 841 (Tex.App.-Corpus Christi 1983, writ ref'd n.r.e.). In this case, essentially the same facts formed the basis of the securities,

breach of contract, and DPTA claims and failure of consideration affirmative defense. While the DPTA claim was added just before trial, the attorneys' efforts already expended on the case were necessary to sucessfully prosecute the DPTA claim and therefore should not be segregated. The district court properly considered all relevant factors and properly awarded attorneys' fees. [8]

VII

[15] Finally, GAC argues that the case should be dismissed for failure to join an indispensable party, James Rumpf. Fed.R.CivP. 19(a) requires joinder of a person if:

> (1) in his absence complete relief caanot be accorded among those already parties, or (2) he claims an interest relating to the

> subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

GAC has not established that it may be subject to multiple or inconsistent obligations if Rumpf is not joined, nor has it established that the disposition of the case will impair or impede any interest Rumpf may have.

[16,17] Moreover, it is well-established that Rule 19 does not require the joinder of joint tortfeasors. See Herpich v. Wallace,

430 F.2d 792, 817 (5th Cir.1980). Nor does it require joinder of principal and agent. See Milligan v. Anderson, 522 F.2d 1202, 1204-05 (10thCir. 1975); C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2d Section 1623 (1986). Finally, Rule 19 does not require joinder of persons against whom Ross and GAC have a claim for contribution. See Dunlop v. Beloit College, 411 F.Supp. 398, 403 (W.D.Wis. 1976); Wright, Miller & Kane, supra at Section 1623. Thus, whether Rumpf be a joint tortfeasor, agent, or contributor to the award, Rumpf was not an indespensible party to this case. [9]

VII

The decision of the district court is AFFIRMED.

1. After this suit commenced the investors each received a check for $51.42. Hohn tried to cash the check, but it was returned for lack of sufficient funds.

2. Defendants also included Viewtek Corp., First Performance Television Corp., Gustave Nathan, and Robson & Miller, the law firm that authored the tax opinion letter in the Program memorandum and description. Jack Nottingham, whose name is in the style of this case was originally a plaintiff, but settled with GAC and Ross before trial.

3. The jury awarded $20,000 to Reser, who had purchased two Programs.

4. Consequently, we need not address GAC's contention that the Program is not a security because the investors retained ultimate control and did not enter a common enterprise.

5. Although the amounts awarded may be speculative and higher than the costs established in the evidence, this asserted error is harmless because the district court did not enter judgement on this count.

6. The evidence also allows the jury to determine the various corporations were Ross's alter egos, that Rumpf and Chaisson were GAC's and Ross's agents, and that Ross was therefore personally liable. Since DTPA does not require willful fraud fraud for liability, the jury's finding of no willful fraud is not inconsistent with the award.

7. We reject GAC's argument that only $50,000 of the Note should be rescinded, for the Rights Agreement is valueless to the investors without the Production Facilities Agreement. We also reject GAC's argument that rescission was not timely sought; the investors pleaded for recission in their original complaint, which was filed with reasonable dispatch when investors realized that GAC had no intent to fufill its contract obligations and in fact was accelerating the Notes.

8. Gac's challenge to the award of prejudgment interest is meritless. Plaintiffs had not profited on their investment at the date of trial. See Randall v. Loftsgarden, 106 S.Ct. at 3155.

9. Nor are we persuaded that Rumpf was not joined in order to create diversity jurisdiction. The district court had federal question jurisdiction in any event under 28 U.S.C. Section 1331 and 15 U.S.C. Section Section 78j & 78aa. GAC's argument that we should infer anything favorable to GAC and Ross from Rumpf's absence as a witness is also frivilous, for Rumpf was equally accessible to both parties. See United States v. Chapman, 435 F.2d 1245, 1247 (5th Cir.1970).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1732

JACK NOTTINGHAM, ET AL.,

Plaintiffs-Appelles,

versus

GENERAL AMERICAN
COMMUNICATIONS CORP., ET AL.,

Defendants-Appellants

Appeal from the United States District
for the Northern District of Texas

ON PETITION FOR REHEARING
(April 3, 1987)

Before BROWN, RANDALL AND HIGGINBOTHAM,
Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.
ENTERED BY THE COURT:

United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIANNE FLETCHER, et al.	*	
	*	
Plaintiff	*	
v.	*	Civil Action
	*	No.
GENERAL AMERICAN COMMUNICATIONS CORPORATION, et al.	*	3-83-0768-H
	*	
	*	
Defendants	*	

O R D E R

Before the Court are the following :

Jury Verdict filed August 1, 1985.

Pliantiff's Motion for Judgment on the Verdict and Declaration of Relief Thereunder, filed August 16, 1985.

Affidavit of John A. Gillman (for award of attorney's fees and expenses), filed August 16, 1985.

Supplemental Affadavit of John A. Gillman, filed August 20, 1985.

Defendants' Opposition to Plaintiffs' Motion for Judgment and Declaration to Relief Thereunder, filed September 6, 1985.

Plaintiffs' Reply to Defendants'

Opposition, filed September 16, 1985.

Plaintiffs' presentation of options has made the Court's task more difficult. However, after consideration, the Court directs Plaintiffs' counsel to submit by October 4, 1985, a judgement in favor of Plaintiffs against Defendants GAC and Ross, jointly and severally, with the following provisions:

1. Each Plaintiff to recover the sum awarded in the answer in the first column of Question No. 15, e.g., Fletcher - $65,000, etc., plus $2,000 to each Plaintiff, as provided in the Deceptive Trade Practices Act, Code Section 17.50 (b) (1).

2. Prejudgment interest on the above at the rate of ten percent (10%) per annum, as provided in Canvar v. Quality Control Parking, ___S.W.2d___,

No. C-3332, Tex.Sup.Ct., June 5, 1985.

3. Cancelling each Plaintiff's (a) 1983 Security Account Note and (b) Long Term Production Note, in accordance with the jury's answers to Question No. 19.

4. Attorney's fees in the sum of $183,532.80 for services through the trial court, plus expenses in the amount of $19,499.58 (prejudgment interest is not awarded on these amounts). In connection with this award the Court has reviewed the Gilliam Aygust 16 and August 20 Affadavits and Defendants' response thereto as set forth at 16-19, Defendants' Opposition, filed September 6. Plaintiffs' Affadavits supporting fees and expenses satisfy the Fifth Circuit's standards enunciated in Copper Liquor v. Coors, 624 F.2d 575,

684 F.2d 1087 (5th Cir.); Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983); Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974); and Tasby v. Wright, 550 F.2d 262 (N.D.Tex. 1982). The "lodestar" amount awarded, viz., $183,532.80 is documented in detail and is based on time multiplied by rate; the Court finds that the time expended and the rates charged are reasonable for attorneys of the caliber of Plaintiffs' counsel in this community. The Johnson factors do not require an upward or downward adjustment in the "lodestar" amount. Plaintiffs prevailed on most claims; those on which they did not prevail are inextricably related to those on which they prevailed; neither Hensley v. Eckerhart, ___U.S.___, 103 S.Ct. 1933 (1983) or Blum v. Stenson, ___U.S.___,

104 S.Ct. 1541 (1984) justify "compartmentalizing" Plaintiffs' claims and reducing the award. The expenses in the amount of $19,499.58 are reasonable, considering the lenth and magnitude of this complex litigation. (If either side desires additional findings with regard to this award of attorneys' fees and expenses, motion should be filed pursuant to Fed.R.Civ.P. 52(b).)

The judgment should also provide that court costs are taxed against Defendants. The Judgment will bear post-judgment interest at the rate currently provided for federal judgments; that can be left blank and the Court will insert the proper percentage rate.

SO ORDERED
DATED: September 19, 1985.

BAREFOOT SANDERS